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FEB 17 1945
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No. 956

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HARNISCHFEGER CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	10
Conclusion	17

CITATIONS

Cases:

Fleming v. *Atlantic Co.*, 40 F. Supp. 654, affirmed *sub nom.* *Atlantic Co.* v. *Walling*, 131 F. (2d) 518	12
United States v. *Rosenwasser*, No. 106, this Term	14
Walling v. *Belo Corp.*, 316 U. S. 624	8, 10, 11
Walling v. *Emery Wholesale Corp.*, 49 F. Supp. 192, affirmed, 138 F. (2d) 548	12
Walling v. *Helmerich & Payne, Inc.*, 138 F. (2d) 705, reversed, No. 27, this Term	9, 10, 13, 15, 16, 17
Walling v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923	12
Walling v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128	12
Walling v. *Youngerman-Reynolds Hardwood Co.*, petition for certiorari pending, No. 955	13, 15
Walling v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544	12

Statute:

Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201):	
Sec. 7 (a) (3)	2, 15

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The Solicitor General, on behalf of L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit entered in the above case on November 17, 1943.

OPINIONS BELOW

The opinion of the District Court (R. 81) is reported 54 F. Supp. 326. The opinions of the Circuit Court of Appeals (R. 97–103) are not yet reported.

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JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1944 (R. 104). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the payment of overtime at one and one-half times a rate labelled by contract as the "regular rate" of pay meets the requirements of Section 7 of the Fair Labor Standards Act despite the fact that the contract rate is not the actual rate of pay but excludes piece work "incentive" payments earned by approximately 98½ per cent of the employes involved, amounting to about 22 per cent of their earnings exclusive of overtime.

STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060, 29 U. S. C., sec. 201) are as follows:

> SEC. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—
>
> * * * * * *
>
> (3) for a workweek longer than forty hours after the expiration of the second year from * * * [the effective] date [of this section],

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

The facts are adequately set forth in the findings of fact and conclusions of law entered by the District Court (R. 84–88) and are not disputed. They may be summarized as follows:

Respondent is a Wisconsin corporation engaged at West Milwaukee, Wisconsin, in the manufacture, production, sale and distribution of electric cranes, hoists, motors, welders, power excavating machines, welding electrodes, housing panels and other heavy electrical products, substantial quantities of which are shipped interstate (R. 84). It is admitted that respondent's employees are covered by the Act.

Respondent's production employees are classified into two groups called "incentive workers" and "non-incentive workers." Approximately 1,250, or 50 per cent, of the production workers are incentive workers. They are the only employees involved in this case. By agreement with a union representing its employees, respondent compensates the incentive workers on a piece work system with a minimum hourly guaranty. This method of payment is described in some detail in a stipulation of facts (R. 12–23) but its essential

elements are these: The various jobs performed by the incentive workers are "time studied" by the management. The time which a job is shown to consume is multiplied by a standard earning rate per unit of time, and the amount so obtained is known as the "price" placed on that job. Whenever an employee is given work on a job which has been "priced" in the manner described, he receives a job card bearing the "price," and he is paid for his work the amount that he earns at these piece rates or "job prices," unless this amount falls below his basic hourly rate, such as is assigned to each incentive worker. Each worker is guaranteed this basic hourly rate as a minimum for all hours of employment. For this reason respondent's method of compensation may be described as a piece work system with a minimum hourly guaranty.

As a matter of fact, the incentive worker nearly always performs the work in less time than would produce his guaranteed compensation and, therefore, nearly always is paid not at his basic hourly rate but at the piece rates or "prices" set on his jobs (R. 85, 87). On each pay day about 98½ per cent of all incentive workers have received compensation over and above their base rates (R. 87). For each pay period, the incentive workers as a group have received total compensation, exclusive of overtime payments, approximately 28 per cent in excess of the amount they would have received

at the basic hourly rates (R. 87). Indeed, if a piece rate worker does not make "his average high earning rate" as a result of conditions beyond his control, he is entitled to have an adjustment made to yield him his average premium in excess of the base rate (R. 15).

On a large number of jobs which have not been "time studied", the company has contracted to pay, and does pay, each incentive worker an hourly rate at least 20 per cent higher than his basic hourly rate (R. 86). Likewise, whenever an incentive worker is temporarily assigned to day work, he is paid at least 20 per cent more than his basic hourly rate (R. 15). Hence it appears that the basic rate is not intended to represent normal earnings, but rather a conservatively-estimated basis upon which the incentive system may operate.

Respondent's incentive workers frequently work in excess of the maximum number of hours a week specified in Section 7 of the Act. Respondent pays them overtime only at one and one-half times their basic hourly rates. Their piece rate earnings over and above their base rates have not been included in computing overtime compensation for piece rate employment, notwithstanding the fact that the piece rate earnings form the actual compensation of approximately 98½ per cent of the incentive workers and exceed the base rates by an average of 28 per cent. Likewise, when the in-

centive workers are on hourly rates, respondent pays them overtime calculated on their basic hourly rates and not on the 20 per cent higher hourly rates actually paid them for the basic work week. The way in which this system operates when overtime is worked may be illustrated by the following examples:

Example 1

An incentive worker is assigned a basic hourly rate of $1 an hour. He works 50 hours a week at a constant rate of production, spending all his time on jobs which have been time-studied and given a "price" of $5. He completes 15 jobs in the 50 hours and therefore earns $75. Respondent pays him $75 plus extra compensation for 10 hours of overtime. Respondent computes this premium at 50 per cent of the employee's arbitrary basic rate of $1 an hour ($10 \times .50 \times \$1 = \$5$), giving a total for the week of $80. Actually, this worker in fact was receiving compensation at the rate of $1.50 an hour ($75 ÷ 50 hours); and if the premium for overtime had been computed on the actual rate of $1.50 an hour, it would have amounted to $7.50, giving a total for the week of $82.50.

Example 2

An incentive worker is assigned a base rate of 75 cents an hour. He is employed for a 50 hour workweek on jobs which have not been time-stud-

ied. Accordingly, under the employment contract, he is paid 90 cents an hour for his non-overtime work, an hourly rate 20 per cent above his base rate. In computing the overtime, however, respondent pays only one and one-half times the 75 cent base rate. Thus, this worker receives—

50 hours @ 90 cents	$45.00
10 hours premium compensation @ 37½ cents	3.75
Weekly earnings	48.75

If respondent had paid for the overtime hours at one and one-half times the 90 cent hourly rate which the worker was promised by the contract of employment, and actually received, for all his normal non-overtime hours, the computation would have been—

50 hours @ 90 cents	$45.00
10 hours premium compensation @ 45 cents	4.50
Weekly earnings	49.50

Since the method of computing overtime which respondent followed, as these illustrations show, does not take into account the actual earnings of the employees but is based on an arbitrary rate at least 20 per cent lower, the Administrator brought an action under Section 17 of the Act to compel compliance with Section 7. Respondent sought to justify its practice under the following provision in the collective bargaining agreement under which the incentive workers were employed (R. 14, 85)—

> * * * the parties agree that, for all purposes, the regular rate of pay at which

each employee who participates in an incentive plan is employed, is the base rate of each such employee.

Respondent contended that this contractual provision must be accepted for the purposes of Section 7 under the reasoning of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, 631, "that as a matter of law employer and employee may establish the regular rate by contract."

The District Court decided that defendant was violating the Act by excluding from the computation of overtime the piece rates actually paid. The court held (R. 83)—

> Wages computed as a result of piece work are just as much a part of regular compensation, and the employees have just as much right to the same, when earned, as they do to wages when computed on base rates. * * *
>
> The sentence which defendant has quoted from the opinion in the *Belo* case does seem to give some basis for its contention that even though the court find the "regular rate" of wages to be one thing, the parties by contract may make some other basis the regular rate, by merely labeling it as such. I do not believe, however, that such an interpretation is warranted. The language on which defendant relies was not necessary to the *Belo* decision and I am convinced that the court did not intend to convey the idea that after the parties had worked out and agreed upon the compensation to be paid,

> they could then agree what the "regular rate" would be for overtime purposes.

The Circuit Court of Appeals reversed this decision. It held that under the *Belo* decision and that in *Walling* v. *Helmerich & Payne, Inc.*, decided by this Court November 6, 1944, an employer and his employees are free to fix by contract the "regular rate" on which overtime shall be computed even though the rate thus established is intended to be, and is, less than the rate at which the employee is actually employed, "provided * * * they act in good faith and respect the minimum of wages * * * fixed by the statute." (R. 100–101). The court further stated (R. 102):

> They [respondent and its employees] therefore defined regular wage and left therefrom the incentive wage * * *
>
> There is only one question before us: What was the regular rate of pay? The employer and employees have, as they had a right to do, answered that question for us. * * * They agreed upon the regular rate of pay, and their regular rate respected the minimum requirement provisions fixed in the statute. We must therefore accept their agreement.

Judge Minton dissented in an opinion which emphasizes the breadth of the court's decision (R. 102–103):

> I cannot agree that the *Belo* case is authority for the bold proposition that, where the "regular rate" of pay is defined by con-

tract, that definition is controlling, if the contract is made in good faith and the rate specified is above the minimum of the Wages and Hours Act.

* * * * *

Because I believe that the "regular rate" fixed by the contract is not the one actually used, and that the "regular rate" is to be determined by what the parties do and not by what they contract to do, I would affirm the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The decision below results, we believe, from a misunderstanding of the decision of this Court in *Walling* v. *Belo Corp.*, 316 U. S. 624, and is in conflict with *Walling* v. *Helmerich and Payne, Inc.*, No. 27, this Term.

Ever since the enactment of the Fair Labor Standards Act a fundamental question in the administration of Section 7 has been whether the "regular rate" on which overtime is to be computed is the rate actually paid or may be any rate which the employer and employees agree to treat as the regular rate of pay for the purposes of the section. In *Walling* v. *Belo Corp.* this Court held that an employer and employees could by contract provide for a guaranteed minimum weekly salary and specify a regular hourly rate of pay not lower than the statutory minimum, with overtime compensation of not less than one and one-half times

this specified rate. The Government contended that the regular hourly rate fixed by the contract was not the actual rate of pay for the normal non-overtime hours (316 U. S. at 631–632); but, on the facts before it, the Court rejected this contention and held that the contracts of employment "were intended to, and did, really fix the regular rates at which each employee was employed" (121 F. (2d) at 210; 316 U. S. at 629–630). It is quite apparent, therefore, that this Court's further statement (p. 631) that "it is agreed that as a matter of law employer and employee may establish the 'regular rate' by contract" had reference to a contract fixing the actual rate of pay and does not justify agreements attempting to fix for the purposes of Section 7 regular rates which are not intended to be, and are not, the actual rates at which the employees are employed. The fact that the employees enjoyed the security of an assured weekly income under their agreements was, also, an important factor in the decision of the *Belo* case. (316 U. S. at 635.)

The principle stated by this Court has been the basis of the administration of the Act. The Administrator has consistently held that an employer and his employees are free to fix by contract at any amount in excess of the statutory minimum the employees' actual, regular rate of compensation—*i. e.*, the rate which the employees are in fact paid for normal, non-overtime employment.

But it has also been his consistent position that, once the actual rate of compensation for non-overtime work has been fixed by the employment agreement, the employer must pay one and one-half times that rate for overtime and cannot escape this obligation by any contractual arrangement fixing for the purposes of Section 7 some other rate as the "regular rate of pay".

A number of courts, however, have held the *Belo* decision to mean that the parties may fix as the "regular rate" for the purposes of Section 7 any rate which exceeds the statutory minimum, even though it is not intended to be, and is not, the actual basis of the employees' compensation for normal, non-overtime work. See *e. g., Fleming* v. *Atlantic Co.*, 40 F. Supp. 654 (N. D. Ga.), affirmed *sub nom., Atlantic Co.* v. *Walling*, 131 F. (2d) 518 (C. C. A. 5); *Walling* v. *Emery Wholesale Corp.*, 49 F. Supp. 192 (N. D. Ga.), affirmed, 138 F. (2d) 548 (C. C. A. 5); *Walling* v. *Villaume Box & Lumber Co.*, 6 Wage Hour Rept. 544 (D. Minn. 1943); *Walling* v. *Lexington Roller Mills*, 6 Wage Hour Rept. 923 (E. D. Ky. 1943); *Walling* v. *Uhlmann Grain Co.*, 7 Wage Hour Rept. 128 (N. D. Ill. 1944).

One of the most extreme of these decisions was *Walling* v. *Helmerich & Payne, Inc.*, 138 F. (2d) 705 (C. C. A. 10), which this Court brought before it by writ of certiorari. The judgment below was reversed in an opinion which holds that the regu-

lar rate is to be determined from "the wages actually received". This Court there said (slip opinion, p. 3)—

> While the words "regular rate" are not defined in the Act, they obviously mean the hourly rate actually paid for the normal, non-overtime workweek.

This decision, we believe, should have been understood to establish the proposition that no rate of pay not actually observed during normal, non-overtime hours of work, even though labelled in a contract as the "regular rate", comes within the meaning of Section 7. In *Walling* v. *Youngerman-Reynolds Hardwood Co.*, in which a petition for certiorari is being filed concurrently with this petition, however, the Circuit Court of Appeals for the Fifth Circuit did not so construe the *Helmerich & Payne* decision, but held that an employer who was paying piece rates actually yielding approximately 59 cents an hour during both overtime and non-overtime hours might avoid paying one and one-half times those rates for overtime by means of contracts with his employees which recited that 35 cents an hour should be their "regular rate" of pay. Similarly in the instant case, the court below recognized that its decision permitted the employer to compute the 50 per cent premium for overtime without including the incentive bonuses which were in fact paid to 98½ per cent of the workers as part of their regular compensation and which constituted 22

per cent of each payroll exclusive of overtime. The court held, nevertheless, that this result was proper under the decisions of this Court.

If these two decisions prevail, it will be possible for an employer, if he can secure or compel the acquiescence of his employees, to nullify by private contract the overtime provisions of the Fair Labor Standards Act at least as applied to piece workers. Congress intended Section 7 to apply to piece workers as well as to employees who are paid on an hourly basis. Piece rates "must be translated or reduced by computation to an hourly basis for the sole purpose of determining whether the statutory overtime requirements have been fulfilled" (*United States* v. *Rosenwasser*, No. 106, this Term, slip opinion, p. 3). It is apparent in the instant case, therefore, that the compensation of an incentive worker for each overtime hour in a given week should be one and one-half times an amount determined by dividing his piece rate earnings by the number of hours worked. The Court below, however, looked only to the contract which labelled as the "regular rate" an artificial amount 22 per cent less on the average than the actual compensation reduced to an hourly basis. Solely because of this label, the court below held that it was within the statute for respondent to calculate the overtime premium on the lower, artificial rate to which the parties agreed and not on the actual non-overtime compensation. Upon

this basis, the overtime premium was 22 per cent less than that prescribed by Section. 7.[1]

There is in this case no such total evasion of Section 7 as is present in the *Youngerman-Reynolds* case, in which the hourly "regular rate" was set so low as altogether to avoid additional pay for overtime work; but the type of arrangement employed is essentially the same. By means of such a device, the Fair Labor Standards Act may be reduced to a minimum wage law when it suits the purposes of an employer or of both parties to the employment relation to have it so. The two-fold purpose of Section 7, namely (1) to spread employment by rendering overtime more costly than regular employment and (2) to confer a

[1] It should be emphasized that the instant case does not present a situation in which the employer and employees have fixed a regular rate of pay by contract making an "effort to base the regular rate upon the wages actually received" and "the hours actually and regularly spent each week in working" (*Walling* v. *Helmerich & Payne*, slip opinion, p. 4). On the contrary, both parties to the contract knew from experience that the incentive workers regularly earned, on the average, 28 per cent more than their so-called base rates of pay. For this reason an incentive worker was paid 20 per cent more than his base rate whenever he was placed on a job for which no "price" had been set.

It is also significant that piece rates were to be adjusted by means of grievance procedure whenever a worker could not make "his average high earning rate" (R. 15), i. e., his normal incentive premium. The decision below necessarily holds that in fixing a regular rate for the purposes of Section 7 the employer and employees need not make even a a reasonable approximation of the actual rate paid for non-overtime hours but may select any lower, arbitrary rate which they deem convenient.

wage benefit upon employees during overtime hours (see *Walling* v. *Helmerich & Payne*, slip opinion, p. 3), may be totally defeated. In the present case that purpose was seriously impaired.

The principle here involved is not limited to piece rate workers. If a fictitious "regular rate" may be substituted for actual piece rates for the purpose of calculating overtime, it is difficult to see why a similar substitution for regular hourly or daily wages may not be made. Respondent does in fact calculate the overtime compensation of incentive workers who are temporarily being paid by the hour, not on the hourly rates actually being paid, but on the lower, arbitrary base rates. Such an arrangement, accompanied by an arbitrary designation of certain hours each day as "overtime" hours, was declared to be illegal in *Walling* v. *Helmerich & Payne, supra*. The conflict between that case and the present one, together with the need of correction of the present decision at the hands of this Court, thus becomes apparent.

Until the present situation is clarified, it will be impossible to achieve a rational and fair administration of Section 7. If the *Youngerman-Reynolds* and *Harnischfeger* decisions are permitted to stand, the Administrator cannot continue to insist that the actual rate of compensation is controlling for overtime purposes without arousing the charge that he is acting in disregard of binding court decisions—a charge which tends to bring

the administration of the Act into disrepute. He cannot, on the other hand, acquiesce in the view of these cases without partially setting at naught the principle enunciated by this Court in *Walling* v. *Helmerich & Payne, Inc., supra* (slip opinion, p. 3), and reiterated in *United States* v. *Rosenwasser* with especial reference to piece workers (slip opinion, p. 3), that "the words 'regular rate' * * * obviously mean the hourly rate actually paid for the normal, non-overtime workweek." In any event, discrimination and unfairness in the operation of Section 7 will result unless this Court adjudicates the questions now presented; for some employers will pay overtime on the basis of actual regular rates of pay while others, on the basis of the decisions here sought to be reviewed, will stipulate with their employees that lower "regular" rates shall be used in calculating overtime. The evil of unfair competition with respect to hours of work and rates of overtime pay will flourish without the check which Congress intended.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

DOUGLAS B. MACGS,
Solicitor of Labor.

FEBRUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE 1945